

IN THE SUPREME COURT OF THE STATE OF DELAWARE

|                    |   |                                 |
|--------------------|---|---------------------------------|
| JOHN A. WARD,      | § |                                 |
|                    | § | No. 612, 2008                   |
| Defendant Below,   | § |                                 |
| Appellant,         | § | Court Below—Superior Court      |
|                    | § | of the State of Delaware in and |
| v.                 | § | for New Castle County           |
|                    | § |                                 |
| STATE OF DELAWARE, | § |                                 |
|                    | § |                                 |
| Plaintiff Below,   | § | Cr. ID No. 85006215DI           |
| Appellee.          | § |                                 |

Submitted: January 14, 2009

Decided: March 10, 2009

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 10<sup>th</sup> day of March 2009, upon consideration of the appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The appellant, John A. Ward, filed this appeal from the Superior Court's opinion of November 19, 2008 that summarily dismissed his August 2008 motion for postconviction relief pursuant to various subsections of Superior Court Criminal Rule 61(i).<sup>1</sup> The State of Delaware has filed a motion to affirm the Superior Court's judgment on the ground

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<sup>1</sup> See Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to postconviction relief).

that it is manifest on the face of Ward's opening brief that the appeal is without merit.<sup>2</sup> We agree and affirm.

(2) In April 1978, a Superior Court jury convicted Ward of Robbery in the First Degree and Assault in the Third Degree. At sentencing in July 1978, the Superior Court declared Ward a habitual offender and sentenced him to life in prison without parole. On direct appeal, this Court affirmed Ward's convictions and sentence.<sup>3</sup> Thereafter, Ward filed unsuccessful petitions for federal and state habeas corpus relief and an unsuccessful motion for correction of sentence.<sup>4</sup>

(3) On appeal, Ward alleges, as he did in his postconviction motion, that he was denied his constitutional right to a grand jury indictment when at trial the Superior Court deleted one of two aggravating factors from the robbery count.<sup>5</sup> Ward contends that the Superior Court abused its discretion when dismissing this claim pursuant to Rule 61(i). First, he argues that the claim raises a constitutional violation that warrants

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<sup>2</sup> Del. Supr. Ct. R. 25(a).

<sup>3</sup> *Ward v. State*, 414 A.2d 499 (Del. 1980).

<sup>4</sup> *See United States ex rel. Ward v. Redman*, D. Del., C.A. No. 80-551, Schwartz, J. (June 5, 1981) (denying federal habeas corpus relief); *Ward v. State*, 2004 WL 1874666 (Del. Supr.) (affirming denial of state habeas corpus relief); *Ward v. State*, 2006 WL 1343639 (Del. Supr.) (denying motion for correction of sentence).

<sup>5</sup> Ward has chosen not to brief a claim of insufficient evidence that he raised in his postconviction motion. We conclude that Ward has waived or abandoned the claim and have not addressed it on appeal. *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

application of the Rule 61(i)(5) exception<sup>6</sup> to a claim that is otherwise barred as untimely pursuant to Rule 61(i)(1)<sup>7</sup> or procedurally defaulted pursuant to Rule 61(i)(3).<sup>8</sup> Second, Ward claims that the claim was not formerly adjudicated pursuant to Rule 61(i)(4) as was determined by the Superior Court.<sup>9</sup>

(4) After careful consideration of Ward's opening brief and the State's motion to affirm, we have concluded that the judgment of the Superior Court should be affirmed. Assuming (for the purpose of argument only) that the Superior Court's dismissal of Ward's claim as formerly adjudicated was an abuse of discretion, we conclude that the claim is nonetheless subject to dismissal as untimely and as procedurally defaulted. The claim, raised for the first time in Ward's postconviction motion more than twenty-five years after his conviction became final, and in the absence

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<sup>6</sup> See Del. Super. Ct. Crim. R. 61(i)(5) (providing that bars to relief are inapplicable to a jurisdictional claim "or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction").

<sup>7</sup> See Del. Super. Ct. Crim. R. 61(i)(1) (barring claim filed more than three years after judgment is final or after newly recognized retroactively applicable right) (amended 2005 to reduce limitations period to one year for conviction final after July 1, 2005).

<sup>8</sup> See Del. Super. Ct. Crim. R. 61(i)(3) (providing that any ground for relief that was not previously asserted is barred unless the movant demonstrates "[c]ause for relief from the procedural default" and "[p]rejudice from violation of the movant's rights").

<sup>9</sup> See Del. Super. Ct. Crim. R. 61(i)(4) (providing that "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice).

of demonstrated cause and prejudice, was appropriately summarily dismissed as procedurally barred without exception.

(5) It is manifest on the face of the opening brief that the appeal is without merit. The issues presented on appeal are controlled by settled Delaware law. To the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice